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No. 06-1085

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IN THE

Supreme Court of the United States

ROBERT J. AYERS, JR., *ET AL.*,

Petitioners,

v.

DEANNA FREITAG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Did a correctly instructed jury, applying well-established Title VII law, properly find that (a) the plaintiff-respondent was subjected to a sexually hostile work environment and that (b) the defendant-petitioner failed in its duty to take prompt effective remedial action once it was on notice of the sexually hostile work environment?

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INTRODUCTION

Petitioners have presented no "compelling reasons" for their Petition for a Writ of Certiorari to be granted. *See* Sup. Ct. R. 10. The decision of the Ninth Circuit is not in conflict with a decision of this Court. Indeed, Petitioners' contention, that state departments of correction are exempt from an important aspect of Title VII's prohibition against sexual harassment, conflicts with the decision of this Court in *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990).

Further, the decision below does not conflict with decisions of any other Court of Appeals. To the contrary, as the Ninth Circuit demonstrates, its decision is in accord with every other Court of Appeals that has addressed the issue.

Finally, the petition does not present an unresolved issue of law that is of national importance or significance. Contrary to the assertions of petitioners, there are not a substantial number of cases in the lower federal courts involving sexual harassment of female correctional officers by prisoners and the failure of prison officials to take steps to protect their employees from such conduct. Rather, as noted recently by the Sixth Circuit, there have been only a few such cases,[1] the decisions of the lower courts with regard to the legal obligations of correctional departments as employers are consistent, and, as established by testimony considered by the jury in this case, other prison officials have taken appropriate steps to control inmate sexual behavior that would create a hostile working environment for their employees.

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[1] *Slayton v. Ohio Department of Youth Services*, 206 F.3d 669, 677-78 (6th Cir. 2000).

REGULATION INVOLVED

29 C.F.R. § 1604.11 provides in pertinent part:

Sexual harassment.

(a) Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

* * *

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will

> consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

[45 FR 74677, Nov. 10, 1980, as amended at 64 FR 58334, Oct. 29, 1999] [footnote omitted].

STATEMENT OF THE CASE

This is an action brought pursuant to Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, by Respondent, a female correctional officer, against her employer, the California Department of Corrections.[2] Her essential claim was that she had been subjected to a hostile working environment because of sexual harassment by prisoners while she worked at the facility at Pelican Bay, that her employer knew of the harassment, and that it had failed to take appropriate corrective action.

The case was tried before a jury, and after a lengthy trial the jury, which had been instructed properly and in accord with established Title VII law, rendered a verdict in her favor.[3] The jury was given a special verdict form with the

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[2]In addition to other Title VII claims, respondent raised a claim that she had been retaliated against for exercising her rights under the First Amendment to the Constitution of the United States. That claim was remanded by the Court of Appeals to the District Court for further proceedings in light of this Court's intervening decision in *Garcetti v. Ceballos*, 547 U.S. ___, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006). Appendix to the Petition for Writ of Certiorari (hereinafter, "App.") at 5, 32-33.

[3]The Petitioners did not challenge below the instructions given to the jury as they pertained to her Title VII sexual

following questions to which it gave the indicated answers:

> Did Plaintiff prove, by a preponderance of the evidence, that she was exposed to a sexually hostile work environment because of inmate conduct?
>
> Answer: Yes.
>
> Did Plaintiff prove, by a preponderance of the evidence, that Defendant California Department of Corrections knew or should have known that she was being subjected to inmate sexual misconduct?
>
> Answer: Yes
>
> Did Plaintiff prove, by a preponderance of the evidence, that Defendant California Department of Corrections failed to take prompt and effective remedial action reasonably calculated to curb or stop the inmate sexual misconduct once it knew or should have known that Plaintiff was being subjected to this inmate behavior?
>
> Answer: Yes.

Court of Appeals Excerpts of Record ("ER"), 2350-51.

The evidence presented at trial overwhelmingly supported the jury's verdict. Both Respondent and a number of other female correctional officers testified as to the deplorable conditions to which they were subjected. The main problem was that inmates engaged in public masturbation in front of female correctional officers. This

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harassment claims.

conduct was long-standing, having begun in the 1990's. Witnesses testified as to its pervasiveness, the impact the conduct had on their ability to perform their duties, and the failure of prison officials to take action in spite of being aware of the conditions.[4]

The constant and unchecked sexual harassment by the inmates caused stress and anxiety for female officers that interfered with their ability to perform their duties. Officer Mayo testified that the incidents degraded her, made her feel like the inmates were in control, and made her not want to do her job. She further testified that she started getting stomachaches and headaches, and on one occasion she had an anxiety or panic attack. She eventually came to the point that she would leave the unit in tears. SER 20; 28-29.

Officer Cruse testified that one inmate's conduct gave her nightmares. She stressed out and cried while she worked in the control booth. At one point she told a sergeant that she was quitting, saying, "I can't take this any more. And I was an emotional wreck." Officer Aguirre had to go to the doctor and "ended up on anti-depressants and sleeping pills because I couldn't sleep at night." Eventually, if she was scheduled to work in the yard she started calling in sick so that she did not have to work in that unit. SER 65; 95-96.

Respondent testified that the actions of the inmates and the resistance of the prison authorities against taking

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[4]The Court of Appeals summarized Respondent's evidence at App. 5-8. Record citations that follow are to the Supplementary Excerpts of Record ("SER") filed by Respondent in the Court of Appeals.

action made her physically unable to go to work.[5] She would throw up and she began using sick time. Subsequently, she sought help from her family physician, who referred her to a psychiatrist. SER 381; 411; 489.

Respondent and other female correctional officers complained on many occasions to their superiors of the inmate's behavior and its effects on them. Thus, female officers informed Pelican Bay officials of the exhibitionist behavior of the inmates and attempted to have them take action to control the offensive activities and, thereby, to ameliorate the hostile working environment the officers were subjected to. As early as 1995, Officer Fraser went to the Pelican Bay Equal Employment Opportunity officer and asked that the problem be addressed. The EEO officer took the position, in conformity with CDC policy, that inmate behavior was not an EEO issue, since only actions of co-workers were considered to give rise to sexual harassment claims. Therefore, no action was taken on Officer Fraser's attempted complaint. SER 959.

Officer Mayo reported inmate threats and misconduct to her supervisors, but "they were not receptive to my complaints . . . . I felt they didn't care. I felt they kind of weren't upset at all that I was having a bad time." Because her supervisors did not respond she then talked to prison managers, including Petitioners Schwartz and Ayers, the Associate Warden and Warden, respectively. She told them about the problems she was having with an inmate "and that

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[5]For example, Ms. Freitag testified regarding an occasion when an inmate in a shower room masturbated and yelled, "Oh God, I'm coming. I am up inside you Freitag." As he was yelling, other inmates joined in. Ms. Freitag testified that she felt "like I was being publicly raped." SER 300-01.

my supervisors were not providing me any support." However, nothing was done to offer her "any sort of protection" by CDC. SER 14; 15-17. In March of 1998 she filed an EEO complaint with the EEO officer, but it was dismissed. SER 33-35.

Other female officers complained to supervisory and administrative staff about the effect the inmate behavior had on them. Officer Aguirre testified that she used to document exhibitionist masturbation "all the time," but eventually gave up writing reports because "I felt nothing was being done or that there wasn't really anything being done." SER 92. Officer Cruse was told by her supervisor "You work in a male institution. You need to deal with the problem." SER 67.

A typical response was that "It's only sex" and should be expected in a facility for men. SER 304. Lieutenant David Carmichael, the supervisor of the Special Housing Unit, did not deny that he had responded to complaints about exhibitionist masturbatory behavior by saying, "What's the big deal" and that he had told women correctional officers "to just get over it, it's part of the job." SER 689

Respondent Freitag testified at length about her efforts to bring the harassment to the attention of Pelican Bay and CDC officials and to get them to take action. After a series of futile attempts to have her immediate superiors take action, she wrote to Petitioner Schwartz, one of the defendants, with a copy to the warden, Petitioner Ayers, another defendant, on April 7, 1999. The memorandum urged that action be taken to prosecute inmates for indecent exposure and stated:

> I should not have to feel raped every time [named inmates] decides to target me or any staff and for the supervisors' callous exchange of me and other female staff, as a sexual favor

> to gain [a named inmate]'s cooperation. . . . . I have not named specific supervisors. My object is to enforce the prosecution and conviction of repeat offenders, offering punitive action as a deterrent. Unless we can prosecute at least the extreme offenders, then every victim is a prostitute, treated like a prostitute, exchanging cooperation for sexual favors to alleviate paperwork and risk of injury for other staff and supervisors.

SER 328-31; 1263.

In addition to the testimony of the Respondent and her fellow correctional officers, she presented testimony from an expert in correctional matters and the report of the Petitioner's own Inspector General in support of her claim.

William Katsaris, plaintiff's expert on prison administration, first testified as to the deleterious effects of the failure to control the harassment engaged in by the inmates would have on the overall operation of the institution as it related to controlling inmate behavior. Asked whether the failure to address the complaints of officers that are offended effects the prison environment, Mr. Katsaris stated:

> Well, the inmates know a lot . . . . If, indeed they know they can get away with something and do, they simply work at it. . . . [W]here you have got someone you dislike and you believe that you have got some power or control or something that you can do that upsets them and nothing can be done about it or is done about it, then it changes the nature of the relationship. Well, in the institution, it changes the condition of employment. And if

> it's serious and pervasive and is unwelcome, then you have a hostile work environment .

SER 124.

Mr. Katsarsis further explained that the administration has a responsibility to both the inmates and the staff to control the behavior of the inmates since, "if the inmates know that nothing is being done about a particular issue, then the inmates start to run the institution." SER 125. In the case of Pelican Bay, the administration gave control away to the inmates. "They gave the inmate control. They empowered the inmate by simply doing nothing." SER 129.

Mr. Katsarsis testified in particular as to the three inmates who were responsible for most of the masturbation in the Security Housing Unit. He found that these inmates "started exhibitionist masturbating to irritate the women specifically." With inmates exhibiting such behavior, it was necessary "to start from day one to show them who is boss." SER 129. However, he testified,

> I found that they did not respond to the exhibitionist masturbation issue and primarily I believe that it was due to male supervisors not having the belief that it was a problem or if, indeed, they . . . did not have a paper trail on these individuals, it wouldn't look bad for the institution. . . . . My opinion is that due to the lack of intervention with this outburst of behavior that continued from 1991 almost unabated at the Security Housing Unit, created that environment, empowered the inmates and created a very hostile work environment for the females.
>
> It [the hostile work environment] was

> most severe and most pervasive. I have a listing of 101 women who were affected , and complaining is not the problem.

SER 130-31.

Mr. Katsaris testified that there were many actions that CDC officials could have taken to control the inmate's behavior but did not. For example, one of the prime offenders was not controlled despite masturbation being a pervasive action by him.

> What is he doing not restrained? What is he doing not on escort status? What is he doing having the capability to do that when since 1991 he has been that kind of problem. He should have been on escort status all the time.

SER 132.

Mr. Katsaris outlined a number of actions that could have been taken, including taking meaningful disciplinary actions; taking away yard privileges if an inmate masturbated in the yard; putting inmates in restraints while in the yard; covering an inmate's cell door window with a one-way opaque covering; covering the windows of the control room with a one-way mirrored finish so the inmates could not see when there is a female officer on duty; videotaping inmate behavior and using it during disciplinary proceedings; and working with the District Attorney to prosecute the most serious offenders for felony indecent behavior so as to increase their sentences. SER 135-44; 164-65.

Mr. Karsaris emphasized that none of these measures were expensive and that other institutions had instituted them. In fact, Pelican Bay was "the only institution I have come across that has a serious problem" with inmate

masturbation. SER 160. The Los Angeles County Jail, the maximum facilities in Colorado and Texas, and Federal institutions in Florence, Colorado, Marion, Illinois, and Atlanta, Georgia, used mirrored material. SER 195-96. Indeed, he "could go around the country where they use this mirrored material just so they [the inmates] can't see what they are doing." SER 144-45.

On cross-examination, Mr. Katsaris summed up his testimony by re-emphasizing the vital importance of controlling the inmates rather than having them control the situation. Disciplining them, prosecuting them, taking away yard privileges, requiring them to be shackled whenever they move "takes control completely away from the inmate. Does, indeed, restrict and control the inmate and to some degree punish them for their deed." SER 185-90.

In addition to the testimony of Mr. Katsaris, testimony from CDC personnel established that there had been a failure to take steps that could have ended the hostile working environment created by inmate behavior. In response to a letter Respondent Freitag wrote to a state legislator, the CDC Inspector General investigated the situation. Richard Ramsdell, who was in charge of the Inspector General's investigation, testified that the office had oversight of the Department of Corrections and had the ability to go in pursuant to California Penal Code § 6126 "and look at issues regarding how the practices of the prison, how things are managed or not managed and conduct investigations if needed." SER 417.

The state investigative team went to Pelican Bay and was provided documents regarding complaints made by female staff members regarding indecent exposure and masturbation by inmates. On the basis of the complaints and other assessments, the team decided to go ahead with the

investigation. The purpose of the investigation was to assess what management had done or not done regarding the complaints by female staff members. Further, the investigation would look into the disciplinary process for the inmates committing the acts and whether cases were being properly forwarded to the local district attorney's office for prosecution. SER 423-27.

The team for the Inspector General's office interviewed approximately forty-six persons as part of its investigation. The majority interviewed were employees, along with several inmates. The team also looked at documents, observed the physical layout of the security housing unit, took photographs, and met with the district attorney's office regarding prosecution of inmates for indecent exposure. The on-site investigation took place between November and December 1999. SER 429-30. Eventually, a report was prepared and presented to the Director of Corrections. SER 4531-64.

The investigators determined, first, that there were approximately twenty inmates who were subjecting female staff to lewd, vulgar language and exhibitionist masturbation. Further, the chief psychiatrist stated that "there is a cumulative effect of female correctional officers being repeatedly exposed to exhibitionist masturbation and could be stress and depression." The investigators found that:

> . . . [T]he supervisors and top administrative staff at Pelican Bay have not responded appropriately to complaints about inmates directing exhibitionist masturbation toward female staff members and have made little effort to take advantage of the options available to control this behavior.

SER 440-41.

The report made a number of recommendations as to what could be done, including moving problem inmates to cells with limited visual access to the control booth, covering the window on the door leading to the exercise yard so that inmates could not see whether a female officer was monitoring the yard surveillance camera, covering cells of problem inmates with one-way mirrored film, providing psychological counseling to problem inmates, making full use of prison disciplinary process, forwarding matters to the district attorney's office, and providing training for all existing correctional and supervisory staff on the effects on staff members and appropriate handling of exhibitionist masturbation behavior.[6] SER 446-48.

Based on this evidence, the jury rendered its verdict in favor of Respondent and the District Court issued injunctive relief requiring the CDC to develop a plan to control the behavior of the inmates. Subsequently, the plan was put into effect and CDC officials have claimed that the problem of inmate indecent exposure at Pelican Bay has largely been corrected.

The Court of Appeals, in a well-reasoned and comprehensive opinion, rejected the argument of the Petitioners that state correctional facilities are exempt from the requirement of Title VII that employers must take action to protect their employees Attorney at Law from sexual

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[6]The assertion in the Question Presented in the Petition for Writ of Certiorari that "guards are hired and trained to confront" prisoner's sexual misconduct is contradicted by the Inspector General's recommendation that correctional staff be trained as to appropriate handling of exhibitionist masturbation behavior.

harassment by third parties. The court affirmed the findings of the jury as fully supported by the evidence introduced at trial.

REASONS FOR DENYING THE PETITION

The decision below does not conflict with decisions of this Court or any Court of Appeals. Nor does it raise an unresolved question of federal law that is of such importance that it warrants review. Rather, the case involves the correct application of established legal principles to the particular facts as found by the jury. Accordingly, petitioners have not demonstrated any compelling reason for the petition to be granted.

I.

THE DECISION BELOW IS FULLY CONSISTENT WITH DECISIONS OF THIS COURT.

A. The Decision Below is Consistent With *Oncale* and *Clark County* and with *University of Pennsylvania v. EEOC*

The facts in this case establish that the Respondent, and other female correctional officers, was subjected to the most egregious sexual harassment possible, short of actual rape. Inmates committed gross acts of criminal indecent behavior, including masturbation directed at them and with the specific intent of harassing them and interfering with their ability to perform their duties.

Petitioners totally failed in their obligation to take reasonable and effective action even to control the atrocious conduct of the inmates. The repeated complaints and requests of Respondent and her fellow officers were met with

callous indifference, inaction, and contempt. They were told to "get over it" because it was "only sex." The inevitable effect of the sexual conduct and the Petitioner's inaction in the face of it was to create a working environment so hostile and degrading as to make it virtually impossible for Respondent and other female correctional officers to carry out their duties.

Petitioners' argument that the decision below is inconsistent with this Court's decisions in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) and *Clark County School District v. Breeden*, 532 U.S. 268 (2001) and the other cases they cite, cannot be taken seriously. It is hard to imagine a set of facts that more clearly establishes "behavior . . . so objectively offensive as to alter the conditions of the victim's employment" (*Oncale*, 523 U.S. at 81) or sexual harassment "'so severe or pervasive as to alter the conditions of [the victim's] employment and create an abusive working environment'" (*Clark County*, 532 U.S. at 270). To compare the single incident concerning a vulgar statement in a job statement involved in *Clark County* to the barrage of vile language and disgusting conduct to which Respondent was subjected to is absurd.

Petitioners claim that "The Ninth Circuit's decision eviscerates the application of *Oncale* and *Clark County* to prisons" (Petition at pp. 11-12). To the contrary, what they seek is the evisceration of Title VII's protection against sexual harassment as it applies to prisons. However, there is no basis in either the statute or policy to exempt prisons from this important protection for their employees. To do so would conflict with this Court's decision in *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990)

In *University of Pennsylvania* this Court refused to allow a special privilege to academic institutions for peer

tenure reviews based on the special nature of university employment proceedings. The Court noted that in 1972, when Congress eliminated the exemption of institutions of higher education from Title VII (and when it also eliminated the exemption of state employers such as CDC), the

> extension of Title VII was Congress' considered response to the widespread and compelling problem of invidious discrimination in educational institutions. The House Report focused specifically on discrimination in higher education, including the lack of access for women and minorities to higher ranking (i. e., tenured) academic positions. See H. R. Rep. No. 92-238, pp. 19-20 (1971). *Significantly, opponents of the extension claimed that enforcement of Title VII would weaken institutions of higher education by interfering with decisions to hire and promote faculty members.* Petitioner therefore cannot seriously contend that Congress was oblivious to concerns of academic autonomy when it abandoned the exemption for educational institutions.
>
> The effect of the elimination of this exemption was to expose tenure determinations to the same enforcement procedures applicable to other employment decisions.

493 U.S. at 190 (emphasis added; footnote omitted).

Hence, the Court held, unless Title VII specifically provides that a particular employer is subject to different rules of law than others, the statute will be applied uniformly. For,

"Congress has made the choice. If it dislikes the result, it of course may revise the statute." 493 U.S. at 194.

There is nothing in Title VII that even suggests that a state correctional department enjoys any special status. *See*, *Dothard v. Rawlinson*, 433 U.S. 321 (1977) where the Court applied the same standard that governed private employers for determining business necessity to height and weight requirement imposed by state prison authorities. In *Dothard*, the state contended that "the establishment of the minimum height and weight standards by statute requires that they be given greater deference than is typically given private employer-established job qualifications." 433 U.S. at 331-32, n. 14. The Court rejected the argument since in the legislative history of the 1972 amendments that extended Title VII to the states "Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." *Ibid.*

To accept the arguments made by Petitioners would have precisely the result this Court warned against when it rejected the argument made in *University of Pennsylvania v. EEOC* for a special privilege rule for universities:

> Acceptance of petitioner's claim would also lead to a wave of similar privilege claims by other employers. . . . We perceive no limiting principle in petitioner's argument.

493 U.S. at 194. Similarly, here, if the Court accepted CDC's argument that it should be governed by different legal standards under Title VII because of the nature of its business, other employers in the public sector can make the same claim.

The issue raised by the facts of this case is whether Respondent is entitled to the same protection against pervasive, severe, and objectively offensive sexual

harassment as are all other employees who are protected by Title VII. The decision of the Ninth Circuit that she is so entitled does not conflict with any decisions of this Court.

B. The Decision Below Is Fully Consistent With Decisions Regarding Deference to Prison Administrators

Petitioners further argue that the decision below somehow conflicts with decisions of this Court holding that federal courts should defer to the discretion of prison administrators. There is no such conflict in the application of the standards of Title VII to protect prison personnel against sexual harassment by inmates.

To begin with, cases holding that Title VII's bona fide occupational qualification provision can permit prison officials not to assign female guards to male institutions, and vice versa, are inapplicable. The California Department of Corrections has decided to assign female guards to Pelican Bay and, once having done so, is not exempt from the requirement that it comply with Title VII regarding their working conditions. *See*, *Dothard v. Rawlinson*, 433 U.S. at 331-32, n. 14.

More importantly, the facts in this case did not involve a dispute as to whether measures taken by prison officials were, in their opinion, adequate or were all that could be done. For example, in the case of *Robino v. Iranon*, 145 F.3d 1109 (9th Cir. 1998), cited by Petitioners, the Ninth Circuit held that the judgments of the prison officials were "entitled to substantial weight when they are the product of a reasoned decision-making process, based on available information and experience." 145 F.3d at 1110. In the present case, CDC did not present any evidence at trial of a reasoned decision-making process addressing the issue of sexual harassment by

inmates. To the contrary, the evidence established that the failure of CDC to control the inmate behavior had a devastating impact on the ability of female officers to do their jobs. Moreover, there was ample evidence that the failure of the CDC to take appropriate remedial steps was due more to the attitude of male supervisory personnel that the conduct of the prisoners was "no big deal" and should be expected, than to any "reasoned decision-making process."[7]

Thus, the evidence fully supports the jury's conclusion that the Petitioners failed to take "prompt and effective" action to correct the conditions.[8] In the present case there was a factual dispute as to whether the CDC and its agents had taken action that was either prompt or effective, and the evidence clearly supports the jury's conclusion that they had not.[9] Petitioners fail to note that the report of the CDC's own

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[7]The Inspector General's investigator testified that the prison's EEO officer told him that he believed that the inmates' actions were because the female officers were "a bunch of lesbians."

[8]The lower courts have consistently held that whether the action taken was "immediate and effective" is a question of fact to be determined, as in this case, by the jury. *See, e.g., Crist v. Focus Homes, Inc.*, 122 F.3d 1197, 1112 (8th Cir. 1997); *Slayton v. Ohio Department of Youth Services*, 206 F.3d 669 (6th Cir. 2000).

[9]The jury was instructed that "The defendants contend that they took all reasonable steps to reduce the frequency of SHU inmate masturbation," and that "Plaintiff must show that the California Department of Corrections' Responses to that environment were legally inadequate", that is, that the CDC "failed to take prompt, effective remedial action reasonably calculated to end the harassment." Further, if the CDC "identified prompt remedial action which was reasonably calculated to curb or stop

Inspector General found that the CDC had failed to act to control the inmate's behavior and provided numerous examples of actions CDC and the Pelican Bay officials could have taken consistent with good prison administration.

II.

THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS

Despite Petitioners' suggestions to the contrary, the holding of the Ninth Circuit is fully consistent with decisions of other circuits. Thus, the lower court appropriately noted that prisons and similar institutions were different than other employers, and that the differences must be taken into account in deciding whether a correctional department is liable for prisoner misconduct. It discussed *Slayton v. Ohio Department of Youth Services*, 206 F.3d 669 (6th Cir. 2000), which held that prisoner conduct *without more* was not enough for liability, given the nature of the prison environment, but went on to hold:

> However, this general rule against prison liability for inmate conduct does not apply where the institution fails to take appropriate

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the inmate conduct" the jury "must find for the defendant." The trial court instructed that "whether the defendant's remedial action is reasonable and adequate depends upon the remedy's ability to curb or stop the sexually hostile inmate conduct from continuing and to discourage other potential inmate offenders from engaging in similar sexually hostile conduct." The court listed a number of factors for the jury to consider in determining whether any remedial action was "reasonably calculated" to prevent the sexually hostile conduct. ER 2312-18. The Petitioners did not object to these instructions or challenge them in the Court of Appeals.

> steps to remedy or prevent illegal inmate behavior.

206 F.3d at 677. Whether the institution had failed to take appropriate steps was a question of fact, not one of law. *Slayton* cited *Powell v. Morris*, 37 F.Supp.2d 1011 (S.D. Ohio), which similarly stated:

> Courts have repeatedly declined to impose sexual harassment liability upon correctional institutions for the sexually offensive conduct of inmates, *as long as the defendant institution took proper preventive and remedial steps with regard to inmate behavior.*

37 F.Supp.2d at 1017 (emphasis added).[10]

Similarly, in *Crist v. Focus Homes, Inc.*, 122 F.3d 1107 (8th Cir. 1997) the Eighth Circuit reversed a grant of summary judgment against the plaintiff, who was employed at a facility for mentally-incapacitated persons. The district court had held, in essence, that the facility was not liable as a matter of law because it could not control the patients. The court of appeals disagreed, holding:

> While we recognize that Focus Homes faced multiple obstacles in immediately preventing J.L. [the inmate] from acting out, including J.L.'s limited ability to understand or respond to directives and the regulatory framework

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[10]The actual holding of *Powell* was that there was insufficient evidence of sexual harassment since the plaintiff pointed to only one incident. The record, here, of course, presents a picture of pervasive and continual acts of sexual harassment.

> within which Focus Homes must operate, that does not end the inquiry. Focus Homes clearly controlled the environment in which J.L. resided, and it had the ability to alter those conditions to a substantial degree.

122 F.3d at 1111-1112. [1]

III.

THIS CASE DOES NOT PRESENT AN ISSUE OF NATIONAL IMPORTANCE THAT NEEDS TO BE RESOLVED BY THIS COURT

In 1980 the Equal Employment Opportunity Commission issued its guideline that employers may be held liable for the acts of non-employees where the employer "knows or should have know of the conduct and fails to take immediate and appropriate corrective action." 29 C.F.R. § 1604.11(e). *See, Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65-66 (1986) (citing § 1604.11 as supporting the Court's interpretation of Title VII regarding sexual harassment); *Farragner v. Boca Raton*, 524 U.S. 775, 799-80 (1998) (citing with approval the similar standard in § 1604.11(d) for employer liability for co-worker conduct). And the lower federal courts have consistently applied the EEOC guideline in a variety of contexts.

Petitioners urge the Court that it should review the decision below "rather than wait for other circuit courts to

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[1] The Eighth Circuit further held that what could be done to control the patient's conduct was the subject of a conflict of opinion between the experts produced by the parties. Their testimony raised a *factual* dispute, so that an inquiry into the facts could not be foreclosed by ruling as a matter of law that there could not be liability. 122 F.3d at 1112.

consider the issue further." However, there is no basis to conclude that the question of the applicability of standard sexual harassment law to prison employees is either in doubt or of general importance. Other than the two cases in California and the handful of decisions in other circuits – all of which are consistent with each other – the issue has not been a matter of wide litigation. As the Sixth Circuit noted in *Slayton v. Ohio Department of Youth Services*: "there is scant appellate case law on this question." 206 F.3d at 677 (discussing the cases as of 2000).

The reason for the few cases raising the issue of sexual harassment by prisoners may lie in the fact that, as testified to by Respondent's expert, Pelican Bay was the only institution he had come across that had a serious problem with inmate masturbation, citing the Los Angeles County Jail, the maximum facilities in Colorado and Texas, and Federal institutions in Florence, Colorado, Marion, Illinois, and Atlanta, Georgia, as having dealt effectively with the problem.

The Petitioners failed in their duty to take appropriate steps to protect its employees at Pelican Bay from the egregious behavior of inmates. The decision of the Ninth Circuit is fully consistent with decisions of this Court, of every other circuit that has considered the issue, and with long-standing principles of Title VII law. There is no reason, let alone a compelling one, for this Court to review that decision.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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